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CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 987

TWYEFFORT, INC., PETITIONER

v.

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND ON MOTION BY PETITIONER TO ADVANCE THE ARGUMENT FOR HEARING WITH NO. 562, RUTHERFORD FOOD CORPORATION *v.* WALLING

MEMORANDUM FOR RESPONDENT

OPINIONS BELOW

The opinion of the district court (R. 692–698) is reported at 65 F. Supp. 920. The opinion of the circuit court of appeals (R. 734–745) is not officially reported.

JURISDICTION

The judgment of the circuit court of appeals was entered January 16, 1947. The petition for certiorari was filed February 5, 1947. The juris-

diction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether tailors performing work for petitioner outside petitioner's principal place of business are employees within the meaning of the Fair Labor Standards Act.

2. Whether the refusal by the district court to direct the Administrator to produce a pre-trial statement given to a Government representative by one of the witnesses was reversible error.

STATEMENT

Petitioner is engaged in the business of custom tailoring at 620 Fifth Avenue, New York City (R. 699–701, 736). It uses the services of eight persons at its place of business (a salesman, bookkeeper, designer, cutter, shipping clerk, and three bushelmen or alteration men), two licensed homeworkers who perform sewing operations in their homes (R. 700, 702, 736–737, 738) [1] and 16 outside tailors who also do sewing in small workplaces outside their homes (R. 700, 704, 736).

Customers ordering garments normally visit petitioner's place of business to select cloth and have their measurements taken (R. 701). After

[1] The "inside workers" and the homeworkers are regarded by petitioner as its employees and subject to the provisions of the Act (Pet., p. 5).

the material is cut on petitioner's premises, the goods are distributed to the outside tailors to be sewed and finished (R. 701, 736). The tailors, working in individual shops, complete separate portions of the garment, some making the trousers, others the coat, and still others the vest (R. 387). The equipment necessary to do the work, such as an iron, needles, and sewing machine, which are of very little value, is owned by the tailors (R. 702, 737–738). However, the lining, trimmings, thread, buttons, and other materials needed to complete the garment are supplied by petitioner (R. 701, 736). The tailors receive detailed directions for sewing the garments by means of specific chalk markings on the materials and specific instructions contained on an accompanying ticket (A. 701, 736). The ticket also contains a try-on date indicating when the tailor is expected to finish his work (R. 701). After the sewing operations are completed, the garment is returned to petitioner's premises by the tailor or picked up by a representative of petitioner (R. 701–702).

No written or oral employment contract exists between the outside tailors and petitioner, and either is free to terminate the relationship at will (R. 703, 737). The tailors' compensation is fixed by a schedule of piece rates established by the firm (R. 703, 738), but they occasionally do alteration work on garments—work ordinarily done by the inside bushelmen—for which they are paid a

fixed hourly rate (R. 703, 737). Petitioner's payroll for both inside and outside employees is made up on the same day of the workweek (R. 703, 738), and the outside tailors have frequently received substantial Christmas bonuses (R. 703). They usually work from 65 to 75 hours a week (R. 695, 738); their annual compensation in some cases has been as little as $800 or $1,200 (R. 703, 738).

Many of the outside tailors have been working for petitioner uninterruptedly for many years (R. 704), some for more than 30 years (R. 704). While a few also have performed work for other firms, the majority work solely for petitioner (R. 704, 738). They worked for petitioner as homeworkers until 1936 when a State order prohibited industrial home work in the Men's Outer Clothing Industry (R. 704, 737). Thereafter, petitioner instructed its tailors who had been homeworkers to obtain outside shops or stores (R. 704, 737). In response to the tailors' protest against assuming additional expenses, petitioner paid them a monthly sum to reimburse them for rent and other expenses incurred in the maintenance of their shops (R. 704, 737).

Most of the outside tailors have regarded themselves as petitioner's employees (R. 705), are members of the union in the trade (R. 705), and have frequently asked petitioner to pay Social Security and Unemployment Insurance taxes on their earnings (R. 705). They do not hold them-

selves out to the public as independent entrepreneurs (R. 705). In most cases they employ no employees (R. 705, 738), although they occasionally pay small sums to errand boys or persons who clean their premises (R. 703).[2] They keep no business records (R. 67, 123, 248, 265, 314, 532) and have no bank accounts (R. 67, 160, 182, 248, 314, 532). They have no firm names or business stationery (R. 705) and no business telephone listings (R. 705). They engage in no advertising (R. 705) and in most cases they do not even have their names on the doors of the shops in which they work (R. 705).

The district court held that the tailors were petitioner's employees within the scope of the Fair Labor Standards Act, stating that the status of workers under this Act "cannot be affected by the mere fact that a tailor, who undoubtedly would be considered an employee if he worked inside a custom tailor's shop, works for a custom

[2] Petitioner, by referring to "helpers and employees," apparently seeks to convey the impression that the outside tailors are operating substantial businesses of their own (Pet., p. 7). The only reference which supports this contention relates to "an exceptional case," Goldberg, who had about 14 employees (R. 695, 738, 744), and this tailor was held an independent contractor (R. 743). The Administrator did not contend nor undertake to prove in the trial court that Goldberg was an employee; the record contains only isolated and fragmentary references to him (R. 224, 228, 404). The other tailors referred to by petitioner, with the exception of Stigliani who had a helper from time to time (R. 618, 738), have no help other than an occasional errand boy or cleaning woman (R. 703, 59, 157, 291).

tailor in an outside shop" (R. 696, 697), and that "to deny to outside tailors of this defendant, who could not be accommodated on its premises, the protection which it gives to tailors doing the same work incidental to the completion of garments in the shop rented by their employer" would enable employers "to thwart the purpose of the Act by the mere device of directing an employee to work in an outside place" (R. 698). The circuit court of appeals affirmed the judgment of the district court (R. 746).

ARGUMENT

1. The court of appeals correctly stated that there is "no valid distinction between homeworkers and outside tailors [in this case]; their work and their conditions of employment (except as to location) are identical" (R. 741). As the opinion below points out, "most of the outside tailors who sewed for defendant's predecessor [before defendant corporation's reorganization] worked in their homes until 1936 when industrial homework in the trade was prohibited [except for certain specially licensed persons]" (R. 737). "Two licensed homeworkers, who do exactly the same kind of work as the tailors who work in outside shops" are employed by petitioner (R. 738).

Although there has been no specific holding by this Court, the Court seems to have recognized homeworkers of this character as employees within the meaning of the Act (see *Gemsco* v. *Walling*, 324 U. S. 244, 251–252, 258, 259, n. 23;

United States v. *Rosenwasser*, 323 U. S. 360, 363, fn. 4), and many lower courts have so held, without conflict.[3] Since the workers here involved cannot be distinguished from home workers,[4]

[3] *Walling* v. *American Needlecrafts, Inc.*, 139 F. 2d 60 (C. C. A. 6); *Fleming* v. *Palmer*, 123 F. 2d 749 (C. C. A. 1), certiorari denied, 316 U. S. 662. See to the same effect also *Fleming* v. *T. Buettner & Co.*, 5 Wage Hour Rept. 279 (N. D. Ill., 1942), reversed on other grounds, 133 F. 2d 306 (C. C. A. 7), certiorari denied, 319 U. S. 771; *Walling* v. *Muncie Novelty Co.*, 6 W. H. Cases 557 (S. D. Ind., 1946); *Walling* v. *Hastings*, 6 W. H. Cases 554 (S. D. Ind., 1946); *Walling* v. *Friedlin*, 66 F. Supp. 710 (M. D. Pa.), overruling *Walling* v. *Todd*, 52 F. Supp. 62 (M. D. Pa.); *Walling* v. *Schweitzer*, 6 W. H. Cases 283 (D. C. Puerto Rico, 1946); *Fleming* v. *Demeritt Co.*, 56 F. Supp. 376 (D. Vt.); *Walling* v. *Sieving*, 9 Wage Hour Rept. 356 (N. D. Ill., 1946); *Nelson* v. *Kuepper Favor Co.*, 4 Wage Hour Rept. 699 (N. D. Ill., 1941); *Mason* v. *T. & P. Optical Mfg. Co.*, 42 F. Supp. 98 (S. D. N. Y.); *Walling* v. *Frank*, 62 F. Supp. 261 (W. D. Ky.); *Walling* v. *Wolff*, 63 F. Supp. 605 (E. D. N. Y.).

[4] Insofar as the employment relationship question here is made to appear more complex than the homeworker situation by petitioner's argument in support of its request for modification of the injunction "in the event certiorari should be granted" (Pet., pp. 47–48), it should be pointed out that: (1) the courts below found that the injunction applied only to tailors who worked directly for petitioner; the few persons who may have been engaged by those tailors were not involved in this case (R. 744); and (2) the fact that the injunction is not directed to other establishments or persons, for whom appellant's employees may also work, may conceivably furnish an argument why a suit should be instituted against those other establishments and persons, but has no bearing on the definiteness or appropriateness of the decree in this case.

In any event, if petitioner does entertain genuine doubts as to the scope of the injunction, it can easily resolve them by petitioning the district court for modification or construction of the decree. *Regal Knitwear* v. *National Labor Rela-*

we believe that the question here presented is settled and the decision below clearly correct, so that there is no reason for granting the petition for certiorari. If, however, this Court should deem this case so closely related to *Rutherford Food Corp.* v. *Walling*, No. 562, as to warrant the granting of the petition, we agree with petitioner that the case should be advanced so that it may be argued with No. 562.

2. The refusal of the district court to order the Administrator to produce the pre-trial statement of one of the witnesses under the circumstances of this case does not present a question warranting review by this Court. Even if it be assumed that such refusal was a departure "from the accepted and usual course of judicial proceeding,"[5] the court below plainly has not "so far sanctioned" it as to call for an exercise of this Court's power of supervision. On the contrary, the circuit court of appeals indicated agreement with

tions Board, 324 U. S. 9, 15. Obviously, this case does not present the type of complex situation or questions of far-reaching importance which call for a drafting of the details of the decree by this Court. Cf. *Hartford-Empire Co.* v. *United States*, 323 U. S. 386, 324 U. S. 570.

[5] But see *Boske* v. *Comingore*, 177 U. S. 459; *Ex Parte Sackett*, 74 F. 2d 922 (C. C. A. 9); *Stegall* v. *Thurman*, 175 Fed. 813 (N. D. Ga.); *Regulations of the Department of Labor* (1915), United States Government Printing Office, pp. 83–84, Article III, Secs. 1 and 2; *Walling* v. *Comet Carriers*, 3 F. R. D. 442 (S. D. N. Y., 1944); *Andrews, Administrator* v. *Trelles* (E. D. La., 1939), not officially reported; *Shallow* v. *Markert Mfg. Co., Inc.*, 4 Wage Hour Rept. 78 (N. Y. S. Ct., 1941); *Haynie* v. *Algoden Mfg. Co.*, 4 Wage Hour Rept. 307 (N. C. Super. Ct., 1941).

petitioner's contention that the trial court erred but ruled that such refusal caused no hardship or injustice in this case (R. 744). It is now settled, even where only private litigants are involved, that denial of the production of such statements in the absence of a showing of hardship or injustice is not error. See *Taylor* v. *Hickman*, No. 47, this Term. The ruling of the court below that the denial in the instant case was harmless is clearly correct, inasmuch as both courts below agreed that "the facts to which he [the witness in question] testified, so far as relevant, were not in dispute" (R. 744, 693).

CONCLUSION

The petition for the writ of certiorari should be denied. But, in the event the petition is granted, the motion to advance the argument for hearing with No. 562 should also be granted.

Respectfully submitted.

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